

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SHIRLEY DARLENE SAMMS**

## Claimant

VS.

## ABILENE NURSING HOME

Respondent

AND

**TRAVELERS INSURANCE COMPANY**

Insurance Carrier

Docket No. 168,071

## ORDER

**ON** the 1st day of February, 1994, the application of the claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge George R. Robertson, dated January 4, 1994, came on before the Appeals Board for oral argument in Salina, Kansas.

## APPEARANCES

Claimant appeared by his attorney, Patrik W. Neustrom of Salina, Kansas. Respondent and insurance carrier appeared by their attorney, C. Stanley Nelson of Salina, Kansas. There were no other appearances.

# RECORD

The record before the Appeals Board is the same as that considered by the Administrative Law Judge as specifically set forth in the Award dated January 4, 1994.

## STIPULATIONS

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge dated January 4, 1994.

## ISSUES

In his Award of January 4, 1994, Administrative Law Judge George R. Robertson found that claimant had suffered a compensable injury to the hand but denied benefits for alleged injury to the back. The issues now before the Appeals Board are nature and extent of disability and whether the Judge's computation of benefits pertaining to the hand is

correct.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Appeals Board affirms the decision of Administrative Law Judge George R. Robertson dated January 4, 1994, that claimant's degenerative back condition is not compensable, and finds the Judge's computation of benefits for injury to the hand is correct.

(1) Claimant is 59-years old and has worked 13 years as a licensed practical nurse. On May 1, 1991, claimant fractured her left thumb when a patient sat on her hand. This accident arose out of and in the course of employment with the respondent.

After the incident, claimant immediately reported the accident and completed an accident report. Claimant then saw Dr. Schwarting for treatment who ultimately referred her to Dr. Peterson for treatment and surgery to the hand.

Dr. Peterson is a board certified orthopedic surgeon and first saw claimant on August 28, 1991, and began treatment of her hand. Dr. Peterson initially fused the carpal metacarpal joint and later removed one of the screws placed in claimant's left hand. Dr. Peterson believes claimant has experienced a twenty percent (20%) impairment of function to the thumb which equates to twelve percent (12%) impairment to the hand based upon the AMA Guides.

After her accident, claimant continued to work for respondent until August 28, 1991. Claimant left work due to her hand surgery that was scheduled for September 10, 1991. In October or November 1991, claimant began occupational therapy for her hand.

In April 1992, claimant reported to Dr. Peterson that she was experiencing left hip pain and told the doctor that she had struck her hip on the side of a wheelchair at the time of her accident in May 1991, and had experienced initial bruising in that area.

In May 1992, claimant reported to Dr. Peterson that she was experiencing pain in both shoulder blades. Dr. Peterson then ordered physical therapy for this problem commencing June 1, 1992.

In June 1992, claimant reported to Dr. Peterson that she was experiencing back problems which the doctor ultimately diagnosed as degenerative changes of the lumbosacral spine at the fourth and fifth lumbar intervertebral level. Although not contained in his records, claimant states that she told Dr. Peterson about her back complaints when she first saw him. The first notation found in Dr. Peterson's medical records pertaining to back complaints is dated June 26, 1992. Dr. Peterson believes claimant has a five percent (5%) permanent partial impairment of function to the body as a whole due to the back condition.

Dr. Peterson released claimant to return to work in the Fall of 1992 and advised her that she should probably limit her work activities to clerical type duties. Dr. Peterson believes that claimant is definitely unable to do nursing care, injections, or other activities utilizing her left upper extremity, and is unable to return to her former duties with the respondent nursing center.

Claimant was evaluated by Dr. C. Reiff Brown on June 28, 1993. Claimant told Dr. Brown that her back complaints began on the day of the accident on May 1, 1991, and that the pain has been quite severe since that time. Dr. Brown also believes that claimant has a degenerative condition in the back and that claimant has a five percent (5%) permanent partial impairment of function to the body as a result of that condition.

Claimant and her husband went to the nursing center many times to discuss returning to work. On several occasions respondent ignored claimant and her husband and refused to meet with them. The respondent has made no attempt to return claimant to work.

The primary issue in this proceeding is whether claimant's back condition is related to the accident of May 1, 1991. The Appeals Board finds that the evidence fails to establish that the back condition is compensable.

As indicated by the Administrative Law Judge, this is a very difficult issue. Claimant contends her back problems began on May 1, 1991, and progressively worsened from that date. However, this contention is not supported, but controverted, by the other evidence presented in this case. A close study of the testimony in evidence indicates that claimant alleges she returned to work for respondent after her accident and worked from May through August with her back and shoulder burning and painful. Claimant alleges she told Dr. Schwarting about her back complaints, but his records fail to contain any notation regarding any back complaints.

Claimant testified that by the end of May 1991 she was experiencing increased symptoms in her low back, hip, and shoulder. Claimant states she did not tell Dr. Schwarting about these increased symptoms when she saw him on June 28, 1991, as she knew he was going to refer her to Dr. Peterson. However, this contention is not borne out by the evidence. Dr. Schwarting did not refer claimant to Dr. Peterson until August 1991. When this fact was pointed out to claimant at the regular hearing, she then testified she was giving nature a chance to heal her, despite her contentions that her condition was worsening.

Another significant inconsistency in the claimant's case is the complete lack of notation of back complaints in Dr. Peterson's records prior to June 26, 1992. To place this in perspective, it should be noted that the first notation of back complaints in any medical records is approximately 14 months after the date of accident and 10 months after commencing treatment with Dr. Peterson, despite the fact that claimant was allegedly experiencing pain to such extent that it was making her drag her left leg and that it was unbearable for her to push her medication cart during the three-month period she worked after the May 1991 accident.

The Appeals Board finds that it is more probably true than not that Dr. Peterson would have noted claimant's back complaints in his records long before June 26, 1992, if claimant had told him of her complaints and their severity as she has alleged. This is not a case where the patient-physician relationship was strained, or where the physician spent little time with the claimant or failed to take an appropriate history or record of complaints. To the contrary, as claimant expressly stated in her letter to Dr. Peterson written in June 1992, this is a situation where there was a very good patient-physician relationship, and claimant thanked him for his wonderful bedside manner and the time and attention he gave to claimant and her husband.

Claimant argues that both Drs. Peterson and Brown believe claimant's degenerative back condition has been aggravated by the work related accident of May 1991. The Appeals Board disagrees. We find Dr. Brown's testimony to be that claimant's degenerative problem is one which may become symptomatic as a result of either a traumatic event or day-to-day living activities. Also, inactivity could contribute to the low back problem as physical deconditioning results from inactivity and causes weakness of the muscles that support the spine resulting in pain and lack of function of the back.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record."

The provisions of the Kansas Workers Compensation Act shall be applied impartially to both employers and employees in cases arising thereunder. K.S.A. 44-501(g).

K.S.A. 44-508(g) defines the burden of proof as follows:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to consider the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 786, 817 P.2d 212 (1991).

Based upon the evidence presented, the Appeals Board finds that claimant has failed to establish that it is more probable than not that claimant has experienced a work related injury or aggravation to her back for which she is entitled benefits under the Kansas Workers Compensation Act. The Appeals Board also finds that claimant is entitled to permanent partial disability benefits pursuant to K.S.A. 44-510d for a twelve percent (12%) permanent partial impairment of function to the hand.

(2) The Appeals Board has reviewed the computation of benefits set forth by the Administrative Law Judge in his Award and finds that said computation is correct for a twelve percent (12%) permanent partial loss to the hand pursuant to K.S.A. 44-510d.

The Appeals Board finds that claimant is entitled to a healing period of 15 weeks as provided by K.S.A. 44-510d; that the temporary total disability rate is \$278.00 per week; that claimant is entitled to 12.36 weeks of permanent partial disability compensation at the rate of \$278.00 per week; and that claimant's total award for temporary total and permanent partial disability benefits is \$20,672.08.

(3) The Appeals Board adopts the findings and conclusion of Administrative Law Judge George R. Robertson as set forth in his Award of January 4, 1994, that are not contrary to the findings and conclusions specifically set forth herein.

### **AWARD**

**WHEREFORE**, the Appeals Board affirms in all respects the Award of Administrative Law Judge George R. Robertson dated January 4, 1994, and adopts the orders contained therein as its own.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc: Patrik W. Neustrom, P.O. Box 1697, Salina, Kansas 67402-1697  
C. Stanley Nelson, P.O. Box 1247, Salina, Kansas 67402-1247  
George R. Robertson, Administrative Law Judge  
George Gomez, Director